

## OGC Has Reviewed

13 November 1951

### PUBLIC OFFICE

29 Comp. Gen. 363

#### QUESTION:

Whether Regular Army Commission of a Colonel was vacated under the provisions of Section 1222, Revised Statutes, 10 USC 576, upon his appointment by the Secretary of Interior to the office of Commissioner of Roads for Alaska. The above statute provides:

"No officer of the Army on active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."

#### ISSUE:

What constitutes a "civil office?"

#### HELD:

"The term 'civil office' as distinguished from 'military office' is synonymous with 'public office' ..."

"The question as to whether a particular position in the public service is a 'public office' or merely public employment is sometimes difficult to ascertain."

Quoting from Winsor v. Hunt, 243 P. 407, 412:

"We think that in 22 Ruling Case Law, 381, the chief elements of a 'public office' are well summed up. The specific position must be created by law; there must be certain definite duties imposed by law on the incumbent, and they must involve the exercise of some portion of the sovereign power. A position which has these three elements is presumably an

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'office,' while one which lacks any of these is mere 'employment.'"

Quoting from Stapleton v. Frohmler, 85 F.2d 49:

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"After considering the matter fully, we are of the opinion that an 'office,' as distinct from an 'employment,' may be created only by the legislative branch of the government, either directly or by necessary implication, for such branch alone has the authority to make 'law,' and that any position which is established by the administrative department cannot be considered as an office within the meaning of the Constitution, but rather as a mere employment."

"... the relative importance of the duties to be performed, standing alone, could not have been intended by Congress to mark the line between mere employment and 'civil office' in applying the grave quality of Section 1222, Revised Statutes."

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